

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

DYES INLET PRESERVATION COUNCIL,)	
)	
Appellant,)	SHB No. 90-15
)	
v.)	
)	
KITSAP COUNTY and CRISTA SENIOR)	ORDER ON MOTIONS FOR
MINISTRIES,)	PARTIAL SUMMARY JUDGMENT
)	
Respondents.)	

On March 30, 1990 Dyes Inlet Preservation Council filed an appeal contesting Kitsap County's issuance of a shoreline substantial development permit to Crista Senior Ministries for Phase I of a retirement complex adjacent to Dyes Inlet, Puget Sound. A pre-hearing order was issued on June 7, 1990 as a result of a conference in which all parties participated. The order recited the legal issues being contested in this appeal.

On July 31, 1990 respondent Crista filed a Motion and Memorandum in Support of Partial Summary Judgment to delete Legal Issues 1, 2, 6, 9, 10, 11 and 16. Also on July 31, 1990, respondent County filed a Motion in Support of Partial Summary Judgment on Legal Issues 1, 2, and 16. Subsequent filings were made (see below).

Oral argument was held on September 7, 1990. Present for the Board in person or via telephone were: Chair Judith Bendor, presiding; Members Harold S. Zimmerman, Annette McGee, Nancy Burnett, Paul Cyr and Jon Wagner. Appellant Dyes Inlet was represented by

1 Attorney Patricia K. Schafer (Gordon, Thomas, Honeywell, Tacoma).
2 Respondent Crista was represented by Attorney J. Tayloe Washburn
3 (Foster, Pepper & Sheffelman, Seattle), and respondent County by
4 Deputy Prosecuting Attorney M. Peter Philley.

5 During oral argument the parties agreed to:

6 Delete Legal Issue No. 3.

7 Delete Legal Issue 10, while acknowledging it may encompass
8 factual issues which might be raised at the hearing and could be
subject to evidentiary challenges;

9 Delete in Legal Issues 8 and 12 this phrase: "and Unclassified
10 Use Permit".

11 The Board has considered the initial filings, the oral argument,
12 and these filings:

Appellant's Response Memoranda (2), filed August 10;
Respondent Crista's Rebuttal Memorandum, filed August 17;
14 Department of Ecology's Amicus Brief, filed August 28; and
Respondent Crista's Reply Brief to Amicus, filed October 1.

15
16 Having deliberated, the Board concludes as follows:

17 CONCLUSIONS OF LAW

18 I

19 The legal issues being contested in these motions can be
20 summarized as follows:

21
22 SEPA

23 Issue 1, was issuing the DNS an error?;

1 Issue 2, would the Crista Shores retirement complex,
2 phases I and II, individually and collectively, have more
3 than a moderate effect on the environment so that an EIS is
4 required?;

5 Issue 16, would the grading and filling require an EIS?;

6 Environmental

7 Issue 6, would the complex have an adverse impact
8 on the Natural System in which it is located, including the
9 wetland, estuary and associated lagoon?; and

10 Issue 9, would the complex adversely affect Dyes Inlet
11 water quality, the associated wetlands and environmental
12 habitat?

13 Other

14 Issue 11, would the issuance of a decision for phase I,
15 while acknowledging that phase II would require a
16 Comprehensive Plan redesignation and subsequent shoreline
17 permit, violate appellant's due process rights?

18 II

19 We conclude that Legal Issue 11 should be stricken. The issue
20 raises a due process constitutional issue. The Board does not have
21 jurisdiction over constitutional issues. See, Yakima County Clean
22 Air Authority v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1975);
23 Bud Vos v. Department of Ecology, PCHB 86-149.1/
24

25
26
27 1/ The sole exception occurs when there is an evidentiary objection
made on constitutional grounds. Then the Board does have jurisdiction
to rule. Administrative Procedures Act, RCW 34.05.452 (1); Hammer v.
Snohomish County, SHB 89-15 (Order on Motion to Suppress Evidence;
July 19, 1990).

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III

We conclude that Legal Issues 6 and 9 should be retained and the motions denied. The Board clearly has jurisdiction under the Shoreline Management Act (SMA), Chapt. 90.58 RCW, over environmental issues. Respondent Crista has not provided any persuasive legal authority in support of a contrary position.

IV

Relying on County Ordinance 128, respondents contend that appellant's SEPA Legal Issues 1, 2, and 16 must be appealed to Superior Court; the Shoreline Hearings Board (SHB) does not have jurisdiction, and the issues should be stricken.

This approach would lead to a split process, whereby the shoreline permit decision would be heard de novo by the SHB, and the SEPA decision considered on the record by Superior Court. This argument fails on several grounds.

The SHB conducts a de novo review of shoreline decisions based on a record developed before it. It can approve, condition or deny shoreline permits. See San Juan County v. DNR, 28 Wn. App. 796, 626 P.2d 995 (1981). A necessary part of this de novo review is the Board's determination whether there has been compliance with SEPA. WAC 461-08-175(1). As the Supreme Court has stated:

In fact, the permit system of the SMA is inextricably interrelated with and supplemented by the requirements of SEPA. Merkel v. Port

1 of Brownsville, 8 Wn. App. 844, 850-51, 509
2 P.2d 390 (1973). The requirements of SEPA
3 clearly overlay the whole SMA permit process.
4 RCW 43.21C.060. Issuance of a substantial
5 development permit under SMA will thus most
6 often require an assessment of the environmental
7 effects of the project. If an assessment leads
8 to the conclusion that the project significantly
9 affects the quality of the environment, an EIS
10 must be prepared. Juanita Bay Valley Community
11 Ass'n v. Kirkland, 9 Wn. App. 59, 73, 510 P.2d
12 1140 (1973). Sisley v. San Juan County, 89
13 Wn.2d 78, 569 P.2d 712 (1977).

14 The requirements of SEPA overlay the whole SMA permit process.
15 Sisley at 83; Polygon Corporation v. Seattle, 90 Wn.2d 59, 65, 578 P.2d
16 1309 (1978); Lassiter v. Kitsap County et al., SHB No. 86-23.

17 V

18 On its face, County Ordinance 128 simply does not deal with
19 shoreline permits and their attendant SEPA review. No where in this
20 Ordinance are shoreline permits, the SMA or the local SMP even listed.

21 The Ordinance does enumerate those land use decisions it
22 encompasses, e.g. at Section 1: zoning matters, RCW 36.70; plats and
23 subdivisions, short plats and subdivisions RCW 58.17; and for
24 environmental policy matters, RCW 43.21C and related state
25 administrative regulations. Section 5: variance and conditional use
26 permits; Section 6: unclassified use permits, preliminary pud approval,
27 pud approval, rezone or plat approval. Clearly the Ordinance
encompasses the SEPA overlay to the above listed land use decisions.

1 It is this Board's responsibility to harmonize laws where
2 possible. In so doing, we conclude that Ordinance 128 simply does not
3 deal with the SEPA overlay of a Shoreline Management Act decision.

4 The courts have made clear that appeals of land use and SMA appeals
5 are different procedures. Kitsap County v. DNR, 99 Wn 2d. 386, 392, 662
6 P.2d 381 (1983). Ordinance 128 provides a separate land use process
7 with its attendant appeal of SEPA, on the record, to Superior Court.
8 Otherwise the ordinance would contravene the previously analyzed
9 authority, as well as be inconsistent with RCW 43.21C.075 which requires
10 that SEPA appeals be linked to a specific governmental action.

11 VI

12 Respondents contend that RCW 43.21C.075(7) requires consent before
13 a SEPA matter is heard by this Board. They cite no authority for that
14 proposition. That section is not applicable to the procedural posture
15 of this case. As a matter of statutory right, aggrieved parties can
16 appeal shoreline decisions to this Board. Consent is not required.
17 (See Conclusion of Law IV, above.)

18 Waterford Place v. Seattle, 58 Wn.App. 39 (May 1990), cited by
19 respondents, simply does not apply. Waterford dealt with the filing in
20 Superior Court of a writ of judicial review of a Master Use Permit (MUP)
21 decision and a SEPA appeal. The jurisdiction of the Shoreline Hearings
22 Board was not an issue. The case also did not deal with splitting
23 review between two judicial arenas.

ORDER

The Legal Issues are MODIFIED per Stipulation of Counsel. The Motions for Partial Summary to delete Legal Issue 11 are GRANTED. In all other respects the Motions are DENIED.

DONE this 2nd day of November, 1990.

SHORELINES HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

[Not available for signature]

ANNETTE S. MCGEE, Member

Nancy Burnett
NANCY BURNETT, Member

Paul Cyr / by JB/
PAUL CYR, Member

Jon Wagner / by JB/
JON WAGNER, Member

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KITSAP COUNTY and CRISTA SENIOR)	ORDER DENYING MOTION
MINISTRIES,)	TO EXCLUDE
)	AMICUS BRIEF
)	
Respondents.)	

The hearing on the merits is scheduled for January 28, 1991 through February 1, 1991.

Respondents had filed motions for partial summary judgment. Further briefing ensued. Oral argument was scheduled for September 7, 1990. On September 4, 1990 the Department of Ecology ("DOE") filed an amicus brief, which the Board accepted and informed the parties by telefacsimile.

At the oral argument, the three parties were represented by their attorneys. DOE was not present. During the argument, respondent Kitsap County objected to the Department of Ecology's amicus brief, which respondent Christa Ministries joined. Appellant took no position. The Board scheduled motions practice on this objection.

On September 13, 1990 respondent Kitsap County filed its memorandum in opposition. DOE filed its reply on September 20, 1990.

Having considered the foregoing, the Board DENIES the motion and provides respondents seven days from receipt of this Order to reply to the amicus brief.

ORDER DENYING MOTION
TO EXCLUDE AMICUS BRIEF
SHB No. 90-17

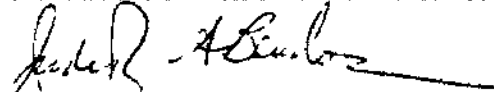
1 It is within this Board's authority to accept amicus briefs, to
2 assist in reaching an informed decision. The Board has historically
3 allowed amicus briefs in appropriate cases. This is an appropriate
4 case, as the legal issue being contested involves an issue of
5 state-wide concern, the Board's jurisdiction to hear SEPA issues in
6 the context of a Shoreline Management Act permitting decision. The
7 Department of Ecology has statewide responsibility for the Act.

8 No prejudice to respondents has been demonstrated if the brief is
9 admitted.

10 The Rules of Appellate Procedure do not govern this de novo
11 proceeding.

12 DONE this 21st day of September 1990.

14 SHORELINES HEARINGS BOARD

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16 JUDITH A. BENDOR,
17 Presiding
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